United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 76-4038

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CONTAINAIR SYSTEMS CORPORATION,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JOHN D. BURGOYNE,
Assistant General Counsel,
JOSEPH OERTEL,
Attorney,
National Labor Relations Board.
Washington, D.C. 20570.

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

ABS DUPLICATORS, INC.—1732 Eye Street, N.W.—Washington, D.C.—298-5537

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate employee Richard Barth upon his unconditional offer to return to work at the close of a strike.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Relations

Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*) for enforcement of its order (A. 2-22)[1] issued against Containair Systems Corporation (hereafter, "the Company") on June 26, 1975. The Board's Decision and Order was issued by a three-member panel of the Board consisting of Chairman Murphy and Members Fanning and Jenkins and is reported at 218 NLRB No. 153. This Court has jurisdiction over the proceeding, the unfair labor practices having occurred in Springfield Gardens, New York, where the Company is engaged in the manufacture and distribution of pilfer-proof containers and related products and packaging cargo for transport by air.

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate employee Richard Barth within 5 days of his March 14, 1974, unconditional offer to cease striking and return to work. The facts are as follows:

Barth was originally hired by the Company on April 29, 1972, to do assembly work. In late October 1973 he became a shipping clerk responsible for arranging with carriers to deliver Company products, loading and unloading trucks, preparing bills of lading and forwarding paper work to the office for billing (A. 4; 71-72, 76-78). The Union[2] commenced

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[1] "A." references are to the Appendix to the parties' briefs. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] Local 295, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America.

organizing the Company's employees on February 20 or 21, 1974.[3] On the morning of February 22, approximately 20 of the Company's 30 employees, included Barth, went out on strike to secure recognition (A. 5-6; 71-74, 159).

Pursuant to the Company's unfair labor practice charges (A. 24-25) alleging that the Union and certain employees had engaged in strike misconduct, the Regional Director conducted an investigation and on March 6 issued a Complaint alleging that in violation of Section 8(b)(4)(B) of the Act the Union had caused employees of Emery Air Freight Corporation to cease handling the Company's products in order to compel Emery to stop doing business with the Company (Case No. 29-CC-401), and that in violation of Section 8(b)(1)(A) of the Act certain named employees (not including Barth) had threatened bodily harm to non-strikers and to Company property (Case No. 29-CB-1729) (A. 26-32). The Regional Director approved a Stipulated Settlement of the complaint by which, without admitting that it had violated the Act, the Union agreed to comply with a cease and desist order, to post customary notices and to perform certain other affirmative acts (A. 40-47). By letter of March 18 to the Regional Director, the Company opposed the Stipulated Settlement on the ground that the Union did not admit that it had violated the Act. On March 20, the Regional Director advised the Company of certain modifications in the Stipulation but refused to excise the non-admissions clause because the "Stipulation provides as complete a remedy as would be obtained after a Board hearing." On July 16 the Board approved the Settlement and issued an order based thereon (A. 6, 51-58; 40-47).

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[3] All dates are in 1974 unless otherwise noted.

Thereafter, the Company sought review in this Court of the Board's action but on June 18, 1975, this Court upheld the Board. See *Containair Systems Corp. v. N.L.R.B.*, 521 F.2d 1166, 1170-1173 (C.A. 2, 1975).

Meanwhile, the Union's picketing ceased on March 13, 1974 (A. 6; 74). At 8:00 AM on the following morning, March 14, 6 or 8 strikers, including Barth, came to the Company's office because they "wanted our jobs back." Al Williams, one of the strikers, asked Company Vice President George Estrada "for all of us, could we all have our jobs back" (A. 11-12; 81-82). Estrada said the strikers should return later in the day after he consulted with his lawyers. At 10:00 AM Barth together with some other employees returned, but Estrada said he had not yet consulted his attorney and requested that the employees "call up after working hours." Barth did so and Estrada told him to come in the following morning, March 15, and "We will talk to you." The following day, as directed, several employees including Barth appeared at 8:00 AM. Estrada individually called each employee into his office. He told Barth that the Company has "charges brought up against you, so you will have to wait until the hearing comes up." Barth left and has not communicated with the Company further (A. 11-13; 74-76, 81-90, 101-106).

On March 14 the Union sent the Company a telegram stating that 23 named employees, including Barth, had "asked to return to work 3-14-74 at 9:00 AM. They were refused entrance to the premises" (A. 13; 37). The next day the Company responded to the telegram stating, in part, that the telegram "does not purport to be an unconditional offer to return to work," that the Company "will accept back to work

all employees except those who had been permanently replaced or who had committed acts of misconduct" and that the Union should direct strikers to report on March 18 when "each" will be told of "his individual status." The letter also noted that two strikers had already been reinstated (A. 14; 38-39). As noted, Barth did not report on March 18 because Estrada had refused to reinstate him pending disposition of the "charges." In April or May the Company permanently replaced Barth (A. 13; 164-165).

II. THE BOARD'S CONCLUSION AND ORDER

The Board concluded that the Company by refusing to reinstate Barth within 5 days of his unconditional offer to return to work made on March 14, 1974, violated Section 8(a)(3) and (1) of the Act (A. 17, 22).

The Board's order requires the Company to cease and desist from refusing to reinstate or otherwise terminating its employees for exercising their Section 7 rights and from "in any like or related manner" interfering with, restraining, or coercing its employees in the exercise of such rights. Affirmatively the order to reinstate requires the Company to offer Barth reinstatement to his former or substantially equivalent position without loss of seniority or other rights and privileges, to make him whole for lost earnings and to post customary notices (A. 18-22).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) and (1) OF THE ACT BY REFUSING TO REINSTATE STRIKER BARTH TO HIS FORMER JOB AT THE END OF THE STRIKE

In *N.L.R.B. v. Fleetwood Trailer Company*, 389 U.S. 375, 378 (1967), the Supreme Court held that:

> Section 2(3) of the Act . . . provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment. If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by Sections 7 and 13 of the Act . . . Under 8(a)(1) and (3) . . . it is an unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justification," he is guilty of an unfair labor practice. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer. *Ibid.* It is the primary responsibility of the Board and not the Courts "to strike the proper balance between the asserted business justification and the invasion of employee rights in light of the Act and its policy." *Id.*, at 33-34.

Accord: *Lodges 743 and 1746, Machinists v. United Aircraft Corp.*, ___ F.2d ___, 90 LRRM 2272, 2281 (C.A. 2, Nos. 72-1936, etc., decided September 9, 1975), pets. for certiorari pending (Nos. 75-1686 and 75-1729).

In the present case, it is undisputed that employee Barth on February 22 engaged in a lawful, economic strike along with other Company employees, that on March 14 he sought reinstatement to his former job and that the Company refused to put him back to work. We show below that the Company has failed to sustain its burden of showing substantial and legitimate business justification for its refusal to reinstate Barth and thus that the Board's finding of an unfair labor practice violation is substantially supported.

A. The Company failed to show that Barth's offer to return to work was conditional

Before the Board the Company contended, *inter alia*, that it was excused from reinstating Barth because Barth failed to make an offer to return to work that was unconditional. However, the record shows, *supra*, p. 4, that on March 14 and 15 when the Company refused to reinstate Barth it did not do so on the ground that his offer was conditional but solely because it had "charges brought up against" him. It is well settled that the Company, by "failing to expressly base the refusal to reinstate upon this ground when the employee appeared for work," has "waived" its right to rely on this argument. *Colecraft Manufacturing Co., Inc. v. N.L.R.B.*, 385 F.2d 998, 1005 (C.A. 2, 1967). See also *N.L.R.B. v. Park Edge Sheridan Meats, Inc.*, 323 F.2d 956, 959 (C.A. 2, 1963).

In any event, the evidence is ample to support the Board's finding that Barth's offer to return was unconditional. While it is true that a precondition to reinstatement is that a striker's offer to return to work

be unconditional, *C.H. Guenther and Son, Inc. v. N.L.R.B.*, 427 F.2d 983, 985 (C.A. 5, 1970), cert. denied 400 U.S. 942; *Colecraft Manufacturing Company, Inc. v. N.L.R.B.*, 385 F.2d 998, 104-105 (C.A. 2, 1967); *Universal Insulation Corporation v. N.L.R.B.*, 361 F.2d 406, 408 (C.A. 6, 1966), it is also true that "the employer has the burden of showing that the offer to return was not unconditional . . . ." *H. & F. Binch Co. Plant of Native Laces, etc. v. N.L.R.B.*, 456 F.2d 357, 363 (C.A. 2, 1972). Contrary to the Company's claim, at no time did Barth or the Union state or imply that the offer was in any way conditioned on reinstatement by the Company of all of the strikers as a group. Thus, as shown, *supra*, p. 4, about 8:00 AM on March 14, when several employees, including Barth, asked Estrada "for all of us, could we all have our jobs back," Estrada told them to return later after he consulted with his lawyer. By 10:00 AM Estrada still had not consulted with counsel, so he instructed the applicants to call "at night." These calls, of course, were made individually, and Estrada told Barth to come to the plant the following morning, March 15, and "We will talk to you." When the employees appeared as directed, Estrada called each separately into his office. He told Barth "charges" had been brought and Barth would have to "wait until the hearing comes up." As noted, Estrada at no time told Barth or any other applicant that their offers to return to work were conditional and therefore insufficient. Significantly, of the 6 or 7 employees who appeared with Barth, two were offered and accepted reinstatement, *supra*, p. 5. Under these circumstances, the Board properly concluded that the Company "clearly understood that [the strikers] were requesting reinstatement individually, and, in fact, considered them individually" (A. 14-15).

Nor was it necessary for Barth to respond to the Company's request that the strikers report on March 18 "when each will be told of his individual job status" (*supra*, p. 5). At no time did the Company indicate that it intended to make Barth a valid offer of reinstatement on that date. Rather, as the Board stated, "Barth had previously been refused reinstatement. In the absence of some personal notification from [the Company] that the situation had changed, he was not required to engage in what would appear to be a completely futile act" (A. 15). *Colecraft Manufacturing Company, Incorporated v. NLRB*, *supra*, 385 F.2d at 1005; *NLRB v. Park Edge Sheridan Meats Inc.*, 323 F.2d 956, 959 (C.A. 2, 1963); *N.L.R.B. v. Comfort, Inc.*, 365 F.2d 867, 878 (C.A. 8, 1966), and cases cited.[4]

B. The Company failed to show that Barth was guilty of misconduct on the job warranting denial of reinstatement

Before the Board the Company further defended its refusal to reinstate Barth on the ground that prior to the strike he had misperformed his job duties, something the Company claims to have become aware of only after the strike commenced. However, the Board properly discounted

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[4] Cases cited by the Company before the Board are inapposite. In *American Optical Company*, 138 NLRB 681, 682 (1962), the Union's reinstatement offer "contained the clear condition that each [striker] would return only if all were taken back." A similar condition was expressly required by the Union in *Sawyer Stores Incorporated*, 190 NLRB 651 (1971). In *Fox and Ginn Moving & Storage Company*, 146 NLRB 707, 712 (1964), one Charles Swayer was told to report to a meeting to arrange for reinstatement but failed to attend and made no further effort to regain his job. In *S.D. Cohoon & Son*, 101 NLRB 966, 967 (1952), the company made valid offers of reinstatement but some strikers never applied and one delayed several weeks before responding.

this defense as an "afterthought advanced to support the decision already made on the basis of Barth's conduct during the strike" (A. 15-16). As stated, on March 15 the Company refused reinstatement with the explanation that Barth faced "charges" and a "hearing", apparently a reference to the pending unfair labor practice proceeding against the Union in which, however, Barth was in no way involved. (*supra*, p. 3). The Company made no mention of Barth's job performance at that time. Moreover, although the Company claims that prior to the strike it was unaware of Barth's alleged shortcomings on the job, the evidence indicated that by March 15, when it refused to reinstate Barth, the Company had learned everything there was to learn about Barth's performance and did not conduct any further investigation (see *infra*, pp. 10-13). Nevertheless, the Company did not seek to rely on Barth's allegedly bad work performance until the hearing herein. This assertion, therefore, is a patent pretext.

This conclusion is reinforced by the trivial nature of the incidents advanced by the Company to support its position. Bess Mandell, Company Office Manager and Bookkeeper, estimated that in the ordinary course of business the Company received about 3 calls per week from customers complaining about non-delivery of ordered goods (A. 8; 123). In the week before the strike started Company Vice President Estrada received 4 to 6 such calls (A. 6; 135-136). Estrada brought these calls to Barth's attention but a search of Barth's desk did not disclose any paperwork relating to these orders. Barth told Estrada that the shipments "should have gone out" and Estrada was satisfied with this explanation (A. 8-9; 172-173). Apparently the errors were on the part of the customers and not Barth because only one of the "4 to 6" customers

called again. As to this customer, Estrada checked further, found "absolutely no paperwork in the office indicating that a shipment had been made" to the customer and, so far as the record discloses, did nothing further (A. 172-173). Clearly, Barth, who prior to the strike was never warned or reprimanded for his work, was in no way negligent in this respect.

When the strike commenced on the morning of February 22, no specific individual was assigned to replace Barth (A. 9, n. 4; 167-168). On February 26, Mandell noticed an usually large number of green invoices in the billing clerk's tray, indicating that shipments had not been made.[5] Estrada went to Barth's office and allegedly discovered about 3 bills of lading which he took to Mandell for processing (A. 9; 110-111, 121-123).[6] One of these bills, dated February 8, was a consignment to General Electric, worth $79.50. It indicated Barth had called a carrier requesting that it make the delivery but there was no explanation why the carrier failed to make the pickup (A. 9; 112-113). A second bill, dated February 19 was a consignment worth $106.04 to Hodes Daniel, also indicating that Barth had called a carrier to make the pickup (A. 9; 62-63, 113-114). The third bill, also dated February 19, was a consignment worth $191.53 to Wilson Air Freight. Wilson normally picked up its own merchandise, but since its employees refused to cross the picket line, about February 27 Containair Systems, Inc. itself delivered the goods (A. 9-10; 64-65,

[5] Although the Company maintains that prompt delivery of its merchandise to customers is "one of the most important functions" required by "the law of [economic] survival," (A. 135, 167), until February 26, 4 days into the strike, the Company did not search Barth's desk for invoices and bills of lading to assure non-interruption of deliveries.

[6] Estrada also found several yellow invoices on Barth's desk, which Barth received "at the last minute" before the strike and so was unable to process (A. 9, n. 5; 160-161).

114-115). This evidence too does not indicate that Barth was at fault because of these failures in delivery. Indeed, since two of the bills of lading were made out just two days before the strike commenced, it is fair to infer that the strike may have been the cause, for, as Estrada testified, "most of the carriers are all unionized" and would not cross the picket line (A. 157). Moreover, there is no showing that these incidents had any significant impact on the Company's business. The Company has continued to supply all three customers (A. 116), and none of the three bothered to complain or even to inquire about the late deliveries (A. 122-127).

On February 29, Company Vice President John Barker made a delivery, promised for about February 22, to the Burroughs Corporation in Piscataway, New Jersey, but discovered that the order had already been sent. Estrada checked the office files and Barth's desk but found no documents showing that the shipment had been made. He then checked the bill of lading machine and found a bill of lading initialled by Barth, indicating that the order had been timely delivered on February 21. Estrada acknowledged that the mixup "could have well been" caused by strike disruption (A. 10, n. 6; 17-18, 138-139, 144). On March 5 the Company received a complaint from Stephen Gould of Massachusetts that he had received a damaged container. The Company's records indicated that the goods had not been shipped, but Gould insisted he had received them (A. 10; 118-119). There was no evidence indicating whether the alleged shipment was made before or during the strike. Accordingly, there was no evidence linking Barth to the alleged error. The Company continues to supply Gould (*Ibid.*).

Finally, during the last week of February and the first week of March, the Company assertedly received numerous complaints that goods had not been delivered, although Estrada and Mandell could not recall the name of a single complaining customer (A. 10-11; 123-124, 161-162). Prompted by these alleged complaints, Estrada conducted a search and discovered 15 to 20 bills of lading in Barth's office. The documents supposedly indicated that some merchandise had not been shipped, and some customers had not been billed for shipments received (A. 10-11; 146-147). However, none of the documents was introduced in evidence. Inasmuch as their dates were not shown, there was no way of establishing that they were Barth's responsibility, rather than the responsibility of his successor on the job during the strike.[7] Moreover, as the Board noted, since customers' complaints "came about the second week of the strike, it seems likely any shipments Barth would have been expected to make would have been ready about the time the strike occurred" (A. 11). On this record, then, it is apparent that the Company has failed to show any substantial defects in Barth's job performance.

C. The Company failed to show that Barth was guilty of misconduct during the strike warranting denial of reinstatement

It is by now well established that, as the Court in *N.L.R.B. v. Thor Power Tool Co.*, 351 F.2d 584, 587 (C.A. 7, 1965), summarized:

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[7] Estrada testified that Barth's practice "generally" was to keep "all of his papers together" "on a clipboard on top of his desk" or "in the right-hand drawer . . . where the files are" (A. 160-161, 163); whereas the newly found documents were scattered "in all parts of the desk, some between papers, some . . . in between . . . the files" (A. 163) thus indicating that they were the work product of Barth's successor on the job.

> flagrant conduct of an employee, even though occurring in the course of Section 7 activity, may justify disciplinary action by the employer. On the other hand, not every impropriety committed during such activity places the employee beyond the protective shield of the Act. The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect . . . Initially, the responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not be disturbed.

Thus, while "strikers may, of course, attempt to persuade non-strikers to join their protest, . . . such efforts must be confined within reasonable limits if they are to be protected." *W.J. Ruscoe Co. v. N.L.R.B.*, 406 F.2d 725, 727 (C.A. 6, 1969); *Oneita Knitting Mills, Inc. v. N.L.R.B.*, 375 F.2d 385 (C.A. 4, 1967). However, strikers do not lose their reinstatement rights when their conduct falls short of violence and is merely a "normal outgrowth of intense feelings developed on picket lines." *N.L.R.B. v. Wichita Television Corporation*, 277 F.2d 579, 584, 585 (C.A. 10, 1960), cert denied, 364 U.S. 871. In other words, "a trivial rough incident or a moment of animal exuberance" does not cloak peaceful picketing with a "taint of force," *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941). Accord: *Terry Coach Industries, Inc.*, 166 NLRB 560 (1967), enforced, 411 F.2d 612, 613 (C.A. 9, 1969) ("relatively minor acts" included telling truck-driver "you better not come back tomorrow," calling non-striker a "bastard," and blocking trucker's entry for several minutes); *Buitoni Food Corp.*, 126 NLRB 767, 782-783 (1960), enforced, 298 F.2d 169, 174-175 (C.A. 3, 1962) (striker hitting cheek of non-striker with coat was

"trivial"; two strikers grabbing non-striker by the arm causing "a brief minor scuffle" was disorderly but not so violent as to preclude reinstatement); *Kayser-Roth Hosiery Co.*, 187 NLRB 562, 572-573, 575-576 (1970) (Irwin and Reed), enforced in relevant part, 447 F.2d 396, 400 (C.A. 6, 1971) ("minor isolated incidents . . . of little or no consequence" included briefly physically blocking non-strikers' ingress, grabbing them by the shoulder and urging them to honor the picket line); *Allied Industrial Wkrs., AFL-CIO Loc. U. No. 289 v. N.L.R.B.*, 476 F.2d 868, 879-881 (C.A.D.C., 1973) (collecting cases; "following an automobile at 30 to 40 feet with no attempt to interfere or communicate" held not disqualifying).

The evidence adduced by the Company here fails to show that Barth engaged in any misconduct in the course of the strike sufficient to preclude his reinstatement. Thus, on one occasion cited by the Company a Woodex lumber truck arrived with a delivery. Since Barth's parked car blocked the entrance "a little bit," Estrada asked that the car be moved and Barth complied. However, the lumber was too long to be unloaded at the dock, so plans were made to unload it in the street. Barth with two pickets then parked his car near the truck in such a way as to prevent the unloading. Estrada asked Barth to move his car; Barth became "a little excited and a little abusive," claiming that, if the truck had a right to block the street, he did also. Estrada repeated his request several times, but Barth continued to refuse, so Estrada said he would call the police. Estrada went inside to make the call, but "the next time [he] looked around, [Barth] had pulled away." The entire incident took 20

to 25 minutes (A. 7-8; 150-153). The Board reasonably concluded that this activity constituted "at the most . . . a single incident of impulsive minor misconduct" which was not disqualifying (A. 16). See cases cited, *supra*, pp. 14-15.[8]

The evidence also fails to show that Barth participated in any way in the illegal secondary boycott activities of the Union. Estrada stated that he observed Barth at the Company's premises speaking to about five truck drivers who subsequently refused to cross the picket line there. Estrada acknowledged that he had "no idea" what Barth said to them. According to Barth, he merely told the drivers that the Company's employees were "on strike" (A. 7; 90-92, 172). At the close of the hearing, the Company was granted a two-week adjournment to interview the drivers concerning these events. The Company later notified the Administrative Law Judge that it had no further evidence to present (A. 2, 7; 177-178, 68A). At most, this evidence shows only that Barth in a non-coercive way may have asked the employees of neutral delivery companies not to cross the picket line established at the Company's principal place

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[8] The cases cited by the Company before the Board are clearly distinguishable, for in each strikers lost reinstatement rights because of conduct involving violence or completely blocking ingress. *W.J. Ruscoe Co. v. N.L.R.B., supra*, 406 F.2d at 725 (strikers pushed and rocked car of non-strikers, pulled driver from truck, shattered truck window, threw gravel at supervisor, and were held in contempt of injunction limiting picketing); *Oneita Knitting Mills, Inc. v. N.L.R.B., supra*, 375 F.2d at 391 (striker furnished transportation to others who engaged in the "criminal and dangerous" act of throwing eggs at moving automobile of non-striker); *N.L.R.B. v. Morris Fishman and Sons, Inc.*, 278 F.2d 792 (C.A. 3, 1960) (pickets formed chain across street, preventing trucks from entering); *Kayser-Roth Hosiery Co., supra*, 187 NLRB at 570, enforced in relevant part, 447 F.2d 396 (Striker Bishop physically blocked truck forcing it to forego delivery); *The American Tool Workers Co.*, 116 NLRB 1681, 1682, 1701-1702 (1956) (striker implied "a threat of physical violence" when he "physically and forcefully blocked delivery truck's entrance to the plant" forcing truck to leave).

of business. It is well settled that such conduct is not illegal. See, e.g., *United Steelworkers of America v. N.L.R.B. (Carrier Corp.)*, 376 U.S. 492, 499-500 (1964).

The evidence further indicates that on two occasions Barth, together with some other strikers, drove to Emery Air Freight at a time when the Company attempted to make deliveries at Emery. They parked across the street from the Emery facility, and observed the facility without speaking to anyone. There was no evidence that Emery employees recognized Barth and his companions. Emery employees refused to unload Containair's trucks (A. 8; 95-98, 148-149), but there was no evidence that Barth in any way prompted their refusal. Although the Board in a related case found that the Union unlawfully caused the Emory employees at various times to refuse to handle the Company's product, (*supra*, p. 3) the Board's Complaint there did not name Barth as one of the Union's agents who engaged in the proscribed activity (A. 29-30), and the evidence in the instant case, as the Board noted (A. 16), does not show "that Barth did anything on these occasions other than being there at the time." Under these circumstances, we submit, the Company has failed to demonstrate any basis for refusing to reinstate Barth.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Board's order should be enforced in full.

JOHN D. BURGOYNE,
Assistant General Counsel,
JOSEPH A. OERTEL,
Attorney,
National Labor Relations Board.
Washington, D.C. 20570.

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

June 1976.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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v.	)	No. 76-4038
CONTAINAIR SYSTEMS CORPORATION, Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

Kelley, Drye, Warren, Clark,
Carr, and Ellis
Att: Irving Brand and
Eugene J. D'Ablemont, Esqs.
350 Park Avenue
New York, New York 10022

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 17th day of June, 1976.